

# CAUSE of ACTION I N S T I T U T E

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

March 8, 2019

## Via Certified Mail

U.S. Immigration and Customs Enforcement  
Office of the Principal Legal Advisor  
U.S. Department of Homeland Security  
500 12th Street, SW, Mail Stop 5900  
Washington, D.C. 20536-5900

## **Re: Freedom of Information Act Appeal Request 2019-ICFO-24679**

Dear Office of the Principal Legal Advisor:

I am writing on behalf of Mike Masnick and Techdirt.com. Cause of Action Institute is providing legal representation to Mr. Masnick and Techdirt.com with regard to the Freedom of Information Act (“FOIA”) request, dated December 14, 2018, that Mr. Masnick submitted on behalf of Techdirt.com to U.S. Immigration and Customs Enforcement (“ICE”), which ICE assigned case number 2019-ICFO-24679.<sup>1</sup> Please direct all further correspondence regarding this request and appeal to my attention at the contact information provided below.

## Background

On November 26, 2018, ICE issued a press release touting its enforcement efforts in “Operation In Our Sites,” which aims to combat copyright infringement, and noting that more than a million websites had been seized in a global operation.<sup>2</sup> On December 14, 2018, Mr. Masnick submitted a FOIA request to ICE on behalf of a Techdirt.com,<sup>3</sup> a blog that he runs, seeking access to information about the program ICE discussed in its press release.<sup>4</sup> Specifically, the request sought three things: “[1] a full list of the domain names that were seized, [2] any related court filings regarding the domain seizures, and [3] any email communications with the ‘high-profile’ industry representatives and anti-counterfeiting associations’

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<sup>1</sup> Ex. 1.

<sup>2</sup> Ex. 2, Press Release, U.S. Immigration & Customs Enforcement, Over a million websites seized in global operation, Nov. 26, 2018, *available at* <http://bit.ly/2DZCXjW>.

<sup>3</sup> Techdirt.com “relies on a proven economic framework to analyze and offer insight into news stories about changes in government policy, technology and legal issues that affect companies’ ability to innovate and grow.” TECHDIRT.COM, *About Techdirt*, <https://www.techdirt.com/about.php> (last visited Mar. 6, 2019).

<sup>4</sup> Ex. 1.

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regarding those seizures[.]”<sup>5</sup> Mr. Masnick also requested that Techdirt.com be categorized as a news media requestor for FOIA fee purposes.<sup>6</sup>

On December 17, 2018, ICE acknowledged receipt of the request, assigned it case number 2019-ICFO-24679, invoked the ten-day statutory response extension for unusual circumstances, and granted Techdirt.com news-media-requester status for fee purposes.<sup>7</sup> On February 21, 2019, ICE issued a final determination letter stating that it had “conducted a search of the ICE Offices of Homeland Security Investigations (HSI) and the ICE Office of Public Affairs (OPA) for records responsive to [the] request and no records were found.”<sup>8</sup> ICE stated that “Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA” and that its “response is limited to those records that are subject to the requirements of the FOIA.”<sup>9</sup> It also provided that this statement was “a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.”<sup>10</sup>

### **ICE Failed to Conduct an Adequate Search**

The FOIA requires agencies to “conduct a search reasonably calculated to uncover all relevant documents.”<sup>11</sup> The search must pass “a ‘reasonableness’ test to determine the ‘adequacy’ of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure.”<sup>12</sup> ICE must search in locations where responsive records are likely to be found and may not limit its search to exclude record systems, custodians, or offices that may contain responsive records.<sup>13</sup>

ICE did not produce any records responsive to this request, which seeks records related to a press statement that ICE itself had issued. That press release specifically mentioned that ICE had seized thousands of website domain names and that it had worked with industry representatives and anti-counterfeiting associations in making those seizures. It strains credulity to believe, and it is impossible to accept, that ICE does not have a single record related to the names of domains it had just seized, any court filings concerning its efforts to seize those

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Ex. 3.

<sup>8</sup> Ex. 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (cleaned up).

<sup>12</sup> *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (citation omitted).

<sup>13</sup> *Callaway v. Dep’t of the Treasury*, No. 08-5480, 2009 WL 10184495 at \*2 (D.C. Cir. June 2, 2009).

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domains, or any communications with the various industry representatives and associations that it claims to have cooperated with.

What appears more likely is that ICE is claiming that all of the records it possesses fall outside the ambit of the FOIA as law enforcement records under 5 U.S.C. § 552(c), such that it is not required to disclose to Mr. Masnick that such records exist. If that is the case, ICE is incorrect. Records responsive to Mr. Masnick's request do not meet the standard for being excluded from the FOIA. Agencies are permitted to treat records as "not subject to the requirements" of the FOIA if, as potentially relevant here, they are (1) exempt from disclosure under Exemption 7(A), (2) the investigation or proceeding involves a possible violation of criminal law, (3) there is reason to believe that the subject of the investigation does not know of its pendency, *and* (4) the disclosure of records could reasonably be expected to interfere with enforcement proceedings.<sup>14</sup>

If ICE is relying on this provision to claim that it does not possess records responsive to Mr. Masnick's FOIA request, its use is improper for at least three reasons. First, 552(c) only protects information about possible violations of *criminal* law. So, to the extent ICE has records of communications with its "[i]ndustry partners participating in the operation [who] were fully responsible for *civilly* seizing 1.21 million domain names,"<sup>15</sup> those records are not covered by 552(c). Second, it is highly unlikely that the individuals or entities who had their web domains seized by ICE do not know of those seizures, as 552(c) requires for withhold records. After seizing web domains under this program, ICE is required to notify interested parties within sixty days of seizing their property and must commence full forfeiture proceedings within ninety days if the domain owner disputes the seizure.<sup>16</sup> As more than sixty days have elapsed since ICE seized the domain names in question, the affected individuals and entities obviously must know of the seizure either because they observed their domain was no longer operating or because ICE notified them of the seizure. Thus, the invocation of 552(c) in this instance is not appropriate. Third, and finally, ICE cannot establish that disclosing the list of already seized domain names, court filings, or email communications with so-called industry partners would interfere with its enforcement proceedings.

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In light of the above, either ICE has failed to conduct an adequate search for records it obviously must possess or it is improperly relying on 5 U.S.C. § 552(c) to

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<sup>14</sup> 5 U.S.C. § 552(c)(1). This subsection also provides for withholding records without acknowledging their existence if they relate to criminal informants or records maintained by the Federal Bureau of Investigation, neither of which appears applicable here. *See Id.* § 552(c)(2)-(3).

<sup>15</sup> Ex. 1 at 1-2 (emphasis added).

<sup>16</sup> *See* 18 U.S.C. § 983.

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issue a no-records response. In either case, ICE must reevaluate its response to Mr. Masnick's FOIA request and disclose records properly subject to the FOIA.

**Conclusion**

If you have any questions or concerns, please contact me by telephone at (202) 499-4232 or by email at [james.valvo@causeofaction.org](mailto:james.valvo@causeofaction.org). Thank you for your attention to this matter.

  
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R. JAMES VALVO, III  
COUNSEL & SENIOR POLICY ADVISOR